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In The

Supreme Court of the United States

October Term, 1998

MAXINE B. COUSIN, et al.,

Petitioners,

v.

DON SUNDQUIST, Governor of Tennessee, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether the Court of Appeals erred in holding that the District Court should have considered white/white contests for the judicial offices in question on the issue of whether the petitioners met the *Gingles* third pre-condition, *i.e.*, "whether the white voting bloc usually defeated the black-preferred candidates" in trial judge elections, when there were no black/white elections for such offices.

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[1] It is the position of the respondents that the petitioners have incorrectly ordered the "Questions Presented for Review". The first two questions as listed by the petitioners pertain to whether single-member districts or cumulative voting are legally available remedies upon a finding of vote dilution under § 2 of the Voting Rights Act in judicial election cases. Before considering whether these issues merit plenary review, this Court should first consider whether the following two holdings of the Court of Appeals merit the granting of a petition for writ of certiorari: (1) the petitioners failed to establish the third precondition under *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986); and (2) the petitioners failed to establish under the "totality of the circumstances" that the at-large election of trial and general sessions court judges of Hamilton County, Tennessee violates § 2 of the Voting Rights Act. *Cousin v. Sundquist*, 145 F.3d 818, 826 and 834 (6th Cir. 1998)("Because the third pre-condition is not satisfied, the plaintiffs' vote dilution claim in this case must fail" and "We find that the district court's application of the totality of the circumstances test was clearly erroneous.") Furthermore, the Court of Appeals' discussion of whether single-member districts is a remedy that can be imposed for a § 2 violation is dicta since that remedy was not even imposed by the district court. *Id.* at 827 ("Even if we had held plaintiffs' vote dilution claim valid, we would not have affirmed a remedy such as they [the plaintiffs] proposed in this case.")

QUESTIONS PRESENTED FOR REVIEW – Continued

2. Whether the lower court erred in its totality of circumstances analysis under Section 2.

3. Whether the Court of Appeals erred in ruling that Section 2 precluded the use of a non-district based remedy, *i.e.*, cumulative voting, for county-wide judicial elections in light of the "substantial" state interest in a coextensive electorate and jurisdiction for such courts.

4. Whether the Court of Appeals erred in ruling that single-member districts could not be used as a remedy for county-wide judicial elections in light of the "substantial" state interest in a coextensive electorate and jurisdiction for such courts.

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The opinion of the Court of Appeals is reported as *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998). The order of the Court of Appeals denying the petitioners' suggestion for rehearing *en banc* and the petition for rehearing on July 10, 1998, is unreported, but it is contained in the Appendix to the Petition for Writ of Certiorari. App. 121. The opinion of the District Court dated September 28, 1995, is reported as *Cousin v. Sundquist*, 904 F. Supp. 686 (E.D. Tenn. 1995). The order of the District Court dated July 3, 1996, imposing cumulative voting as a remedy in this case is unreported, but it is contained in the Appendix to the Petition for Writ of Certiorari. App. 103.

JURISDICTION

The Court of Appeals entered its judgment on June 1, 1998, and denied the petitioners' timely suggestion for rehearing *en banc* and petition for rehearing on July 10, 1998. The petition for writ of certiorari was timely filed; therefore, the jurisdiction of this Court to consider the petition is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or

political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

This case concerns whether the election of trial court and general sessions court judges[2] in Hamilton County,

[2] The trial court judges in Hamilton County include two chancellors, three criminal court judges and four circuit court judges. For purposes of trial courts, the State of Tennessee is divided into 31 judicial districts. Hamilton County comprises the Eleventh Judicial District. Unlike other states, Tennessee has

Tennessee on a county-wide basis to correspond to the jurisdiction of each of these courts violates § 2 of the Voting Rights Act. For the sake of brevity, respondents will recount only those facts essential for this Court to determine that plenary review is unnecessary and that denial of the petition for writ of certiorari is appropriate.

1. Procedural History – The petitioners filed this lawsuit on August 31, 1990. *Cousin v. McWherter*, 840 F. Supp. 1210 (E.D. Tenn. 1994). After a period of discovery and denial of the respondents' Motion for Summary Judgment, the District Court held a trial in November 1993. *Id.* In January 1994, the District Court issued a memorandum opinion finding that the election of trial and general sessions court judges in Hamilton County, Tennessee violated § 2. *Id.* However, that opinion did not specifically discuss the *Gingles* preconditions in its analysis, and the District Court dismissed the state's interest in a coextensive electorate and jurisdiction for trial courts as "nebulous at best." *Id.* The District Court then later issued an order "enjoining the State from conducting any further at-large elections and ordered the State to submit an election plan in compliance with the Voting Rights Act." *Cousin v. McWherter*, 46 F.3d 568 (6th Cir. 1995).

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retained to a large extent its historical tradition of specialized courts. The chancery courts hear primarily equity matters; the criminal courts hear only criminal matters; and the circuit courts hear primarily law matters. There are five general sessions court judges elected county-wide in Hamilton County. The general sessions court in Tennessee is a court of limited jurisdiction hearing civil matters where the amount in controversy is under $15,000 and criminal matters involving misdemeanors or preliminary hearings.

On respondents' appeal, the Court of Appeals vacated the injunction and remanded the case to the District Court with the following instructions:

> On remand, the district court is to determine the presence or absence of the three Gingles preconditions which plaintiffs must necessarily prove in order to establish their vote dilution claim; and if the court finds those preconditions do exist, to consider the totality of the circumstances in order to determine whether, in the context of all those circumstances, a Section 2 violation has occurred.

Id. at 577.

As to the state's interest in a co-extensive electorate and jurisdiction, the Court of Appeals held that the District Court's "characterization of that interest as 'nebulous at best' " in fact "constitute[d] legal error" and instructed the District Court to weigh that interest, which according to the Court of Appeals is "substantial," as follows:

> On remand, the district court must weigh this substantial state interest against evidence bearing on the factors indicative of vote dilution. The state's interest is only one factor to be considered in evaluating the totality of the circumstances. It does not automatically outweigh proof of racial vote dilution. However, because the state's interest is a substantial one, the plaintiffs must produce evidence supporting the dilution claim sufficient to carry their burden of outweighing the state's interest.

Id.

On remand, the District Court issued an opinion on September 28, 1995, again holding that the election of trial court and general sessions court judges in Hamilton County, Tennessee, violates § 2. *Cousin v. Sundquist*, 904 F. Supp. at 714. This time the District Court found that: (1) the petitioners had established all three *Gingles* pre-conditions, *id.* at 688-704; (2) the petitioners had proven a violation of § 2 under the "totality of the circumstances test", *id.* at 704-13; and (3) although the State's interest in a co-extensive jurisdiction and electorate for trial and general sessions court judges in Hamilton County, Tennessee, was "substantial," it did not outweigh a finding of vote dilution under § 2. *Id.* at 713-14. The respondents again appealed. The Court of Appeals reversed the decision of the District Court on a number of alternative grounds. *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998).[3]

2. ***Gingles* Pre-Conditions** – The Court of Appeals began its analysis with the *Gingles* pre-conditions which require a plaintiff to establish the following before considering whether under the "totality of the circumstances" there is a violation of § 2:

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[3] These alternative grounds include: (1) the District Court erred in holding that the petitioners had established the third *Gingles* pre-condition, *Cousin v. Sundquist*, 145 F.3d at 826; (2) the District Court erred in finding a violation under the "totality of the circumstances" test when considering the state's substantial interest in linking the electorate to jurisdiction in the election of trial and general sessions court judges in Hamilton County, Tennessee, *id.* at 834; and (3) "[e]ven if we [the Court of Appeals] had held plaintiffs' vote dilution claim valid, we would not have affirmed a remedy such as they proposed in this case because it is at odds with the important state interest in 'linkage.' " *Id.* at 827.

> [1] the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . [2] the minority group must be able to show that it is politically cohesive. . . . [and 3] the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. at 50-51, 106 S. Ct. at 2752.

The Court of Appeals found that the District Court erred in concluding that the petitioners had met the third pre-condition, and, therefore, concluded that it "need not conduct a detailed inquiry into the first factor, the geographic compactness of blacks in Hamilton County, for a Section 2 claim cannot proceed unless all three Gingles pre-conditions are satisfied." *Cousin v. Sundquist*, 145 F.3d at 823.[4] The facts about the *Gingles* third pre-condition relate to expert testimony analyzing various elections to determine whether the white voting bloc votes usually to defeat the black-preferred candidate. None of the parties or the lower courts dispute the accuracy of the statistical regression analysis performed by the petitioners' and the respondents' experts in estimating how black and white voters voted. Rather the dispute concerns which elections are the most relevant in the analysis. The cause of the disagreement is due at least in part to the fact that no

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[4] As to the second pre-condition, the Court of Appeals noted that the "state concedes, and uncontroverted evidence at trial showed, that blacks in Hamilton County vote sufficiently cohesively to satisfy the second Gingles pre-condition." *Cousin v. Sundquist*, 145 F.3d at 823.

black lawyer has ever run for trial court judge or general sessions court judge in Hamilton County, Tennessee.

The petitioners' expert considered only black/white elections in his analysis. He first considered judicial contests in Hamilton County and the City of Chattanooga, which is located wholly in Hamilton County. Between 1969 and 1991, there were 4 contested elections for city judge in the City of Chattanooga with the black-preferred candidate prevailing in 3 of the 4 elections.[5] In the election for state supreme court judge in 1980, the black-preferred candidate, who is black, was defeated by the white candidate in Hamilton County. In addition, the petitioners' expert looked at 29 other black/white elections on a county-wide and city-wide basis. None of these elections were for any of the offices in question. From these elections, the petitioners' expert calculated that "the average black cohesion was 76% and the average white cohesion 80% . . . " *Cousin v. Sundquist*, 145 F.3d at 824. Based on these figures, the petitioners' expert concluded and the District Court agreed that the white voting bloc in Hamilton County votes usually to defeat the black-preferred candidate in judicial elections. *Cousin v. Sundquist*, 904 F. Supp. 691-704.

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[5] The petitioners state in their Petition that in 2 of the 4 city judge elections, the black candidate prevailed. Petition for Writ of Certiorari, p. 4. However, the petitioners fail to state that, in the 1982 election for city judge, the black-preferred candidate, Meyer, who is white, prevailed over the black-candidate, Timberlake. *See* Trial Exhibit 313.

On the other hand, the respondents' expert considered the following criteria in determining which elections to analyze:

> Dr. Taebel [the respondents' expert] chose his group of elections according to: (1) their 'recency,' under which criterion he limited his inquiry to elections taking place in the last ten years; (2) their relevance, by which he limited himself to elections that were county-wide and partisan, as are elections for the Hamilton County judgeships at issue here; and (3) their contestedness by which he eliminated elections in which the losing candidate received less than 15% of the vote.

Cousin v. Sundquist, 145 F.3d at 824.

The respondents' expert identified 32 elections between 1982 and 1992, of which 12 involved lawyer-qualified offices, *i.e.*, all of the judicial offices in Hamilton County along with the district attorney general and public defender for the county. Only one election analyzed by the petitioners' expert involved a black and white candidate – the 1990 general election for public defender. The Court of Appeals summarized the results of these elections as follows:

> Dr. Taebel's analysis indicated that the minority's preferred candidate prevailed in seven of the 12 lawyer-qualified elections and in 16 of the 20 exogenous elections. Dr. Taebel's figures also showed that in four of the minority-preferred candidate's seven victories in the lawyer-qualified elections, and in nine of the minority preferred candidate's 16 victories in the exogenous elections, that candidate defeated the preferred candidate of the white majority. . . . Given these

> conclusions, Dr. Taebel opined that the white majority did not regularly vote in such a way as to deprive black voters in Hamilton County of the opportunity to elect their preferred candidate.

Id.

3. Totality of the Circumstances

a. History of Discriminatory Efforts to Limit Black Voting – The petitioners state that the district court found "significant examples of public and private discrimination" including "routine segregation in virtually all aspects of life well into the 1960s; past and continuing *de jure* and *de facto* segregation in public housing, public schools, law enforcement, employment, health care, social services; and violence directed at blacks." Petition for Writ of Certiorari, pp. 7-8. As to the first Senate Factor, the District Court made no such findings. Rather, the District Court recounted the history of voting discrimination against blacks in Tennessee and in particular Hamilton County from 1883 through 1911. *Cousin v. Sundquist*, 904 F. Supp. at 705-06.

b. Extent of Racially Polarized Voting – The respondents have previously agreed that blacks vote cohesively; however, as the Court of Appeals noted "the outcome of even a racially polarized election does not always disfavor minority voters, a result which does not support a claim of vote dilution." *Cousin v. Sundquist*, 145 F.3d at 832.

c. Suspect Electoral Practices or Procedures – The Court of Appeals rejected the District Court's conclusion that Hamilton County comprises an unusually and

impermissibly large electoral district for the judicial offices in question noting that "Hamilton County is not unusually large in comparison to other judicial districts in Tennessee." *Id.*

d. Denial of Opportunity to Run for Office – The Court of Appeals found that the parties agree that there is no slating process for judicial offices in Hamilton County and that "the lack of a slating process or other obstacle to candidacy cuts against a finding of vote dilution." *Id.*

e. Effects of Past Discrimination on Political Participation – The Court of Appeals did not disturb the District Court's finding that African Americans in Hamilton County are a "socioeconomically depressed minority with a limited ability to fund and mount political campaigns." *Id. See also Cousin*, 904 F. Supp. at 710.

f. Overt or Subtle Racial Appeals in Political Campaigns – The petitioners assert that there have been overt and/or subtle racial appeals in recent political campaigns in Hamilton County referring to instances involving the 1993 election for the Mayor of Chattanooga and the 1990 public defender's election. Petition for Writ of Certiorari, p. 10. Furthermore, the petitioners imply that the District Court made such a finding. That implication is misleading in that the District Court made no finding whatsoever on this factor as noted by the Court of Appeals. *Id. See also, Brown v. Board of Commissioners of Chattanooga*, 722 F. Supp. 380, 396 (E.D. Tenn. 1989) ("Chattanooga has for the most part been spared both overt and subtle racial appeals in elections".)

g. Extent to Which Blacks Have Been Elected – The Court of Appeals acknowledged that no black has ever been elected as a trial court judge or general sessions court judge in Hamilton County but noted two important facts: (1) "no black has ever run for a county judgeship . . . " *Cousin v. Sundquist*, 145 F.3d at 833; (2) "only 27 black lawyers live in Hamilton County." *Id.* From these facts, the Court of Appeals did "not agree that this factor clearly supports a finding of vote dilution under these circumstances." *Id.*

h. Responsiveness of Elected Officials to Minority Needs – The petitioners make no mention of the responsiveness of the trial court and general sessions court judges in Hamilton County to the needs of minorities. The District Court found and the Court of Appeals agreed that these judges "are responsive to the particularized needs of the black community in Hamilton County inasmuch as these judges are fair and impartial in the disposition of matters before them [and that] there is no proof that any of the present judges have discriminated against any African Americans who have been involved in the judicial process as plaintiffs, defendants, attorneys, jurors, or witnesses." *Cousin*, 904 F. Supp. at 711; *Cousin*, 145 F.3d at 833.

i. Tennessee's Interest in Maintaining At-Large Elections

The District Court and the Court of Appeals both found as a matter of law that the Tennessee's interest in a co-extensive electorate and jurisdiction of the trial courts and general sessions courts in Hamilton County is a "substantial interest". *Cousin*, 904 F. Supp. at 712; *Cousin*,

145 F.3d at 834. The District Court found this "substantial interest" insufficient to outweigh the other factors "because it is overcome by the substantial dilution of black voting strength that it produces in Hamilton County." *Cousin*, 904 F. Supp. at 712. On the other hand, Court of Appeals concluded that the Senate factors including the linkage interest weigh against a finding of vote dilution under § 2. *Cousin*, 145 F.3d at 834.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court Of Appeals' Analysis Of The *Gingles'* Third Pre-Condition Does Not Conflict With The Decisions Of Other Circuits.

The petitioners entirely misconstrue the Court of Appeals' analysis of the *Gingles* third pre-condition as being in conflict with other circuits. The petitioners begin their argument with the misstatement that "[i]n concluding that candidates favored by blacks were not usually defeated by whites voting as a bloc, the court of appeals relied primarily upon the analysis of defendants' expert, Dr. Delbert Taebel." Petition for Writ of Certiorari, p. 22. In fact, the Court of Appeals relied upon the data of both the petitioners' expert and the respondents' expert in concluding that the District Court erred in holding that the petitioners had met the *Gingles* third pre-condition. Specifically, the Court of Appeals stated the following:

> We conclude that the district court's slavish adoption[6] of Dr. Cole's analysis to support a finding that the plaintiffs met the third Gingles pre-condition was error. We reach this conclusion not merely because we disagree with Dr. Cole's methodology, but also because we find Dr. Taebel's study more relevant, and because Dr. Cole's data belie his conclusions. While Dr. Cole testified that, in his opinion, elections pitting two white candidates against each other offered little information for a racial bloc voting analysis, we, like Dr. Taebel, agree with the Eleventh Circuit that such elections do offer relevant information in this inquiry.

Cousin, 145 F.3d at 825.

The respondents do not disagree that the most probative elections for purposes of analyzing the third *Gingles* pre-condition would be elections for trial court judge and general sessions court judge in Hamilton County involving black and white candidates. The problem in this case is that there are no such elections to analyze. The question then becomes which elections should be analyzed and in what order. The petitioners' expert only analyzed black/white elections for any offices in Hamilton County and the City of Chattanooga beginning in the 1960s to the present. The respondents' expert, on the other hand, analyzed elections for trial court judge, general sessions court judge, state supreme court judge, juvenile court

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[6] The Court of Appeals' reference to "slavish adoption" is to the fact that the District Court simply quoted at length from the testimony of the petitioners' expert with no substantive analysis of the third pre-condition. *Cousin*, 904 F. Supp. at 692-700.

judge, district attorney general, and public defender in Hamilton County, which with one exception involved only white candidates, along with county-wide elections for other offices.

In determining which elections to consider in judicial Voting Rights Act cases, other circuits have held that: (1) "Lumping together all elections, judicial and nonjudicial alike creates a risk of glossing over the significant differences between the legislative and judicial arenas." *SCLC v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995) (*en banc*). *See also Magnolia Bar Association v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993) ("Elections involving the particular office at issue will be more relevant than elections involving other offices."); (2) "Although evidence drawn from elections involving black candidates is more probative in Section Two cases, an analysis of split-preference elections is also appropriate and relevant." *Davis v. Chiles*, 139 F.3d 1414, 1418, n. 5 (11th Cir. 1998).

If one looks at the universe of elections considered by the District Court and the Court of Appeals in this case, three categories appear: (1) "lawyer-qualified" elections with black/white candidates; (2) county-wide judicial partisan elections with white/white candidates; and (3) all other elections involving black/white candidates. Contrary to the assertions of the petitioners, the Court of Appeals did not rely solely upon category two in its analysis. In fact, the Court of Appeals used the data of the petitioners' expert to refute the conclusion that the third pre-condition had been met:

> A close look at Dr. Cole's data confirms that, even in the universe of elections he analyzed,

> this result [the white voting bloc usually defeating the black-preferred candidate] does not usually occur. Black candidates won two of Dr. Cole's five black/white judicial elections, an especially impressive success rate when one considers that Timberlake, the losing black candidate in two of the three elections won by whites, was not qualified to hold the office since he was not a lawyer. In addition, blacks won 9 of Dr. Cole's 29 non-judicial black/white elections. In four of those elections – the 1974 Democratic Primary for House District 28, the 1984 Democratic Presidential Primary, the 1990 runoff election for City Council District 7, and the 1990 general election for School Board District 7 – the black candidate prevailed despite unanimous or near-unanimous white cohesion.

Cousin, 145 F.3d at 825. Thus, the Court of Appeals properly considered not only the white/white elections for the judicial offices as analyzed by the respondents' expert but also properly considered the black/white elections for other judicial offices in reaching its conclusion that the District Court erred in its holding that the third precondition had been met.[7]

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[7] The black-preferred candidate won three of the five black/white judicial contests analyzed by the petitioners' expert because Timberlake, the black candidate, was not the candidate preferred by a majority of black voters in the 1982 city judge election in the City of Chattanooga. In fact, there were a total of 7 elections involving black/white candidates for "lawyer-qualified" offices if two public defender elections in 1990, primary election and general election, are included. Of those 7 elections, the black-preferred candidate prevailed 5 times. Trial Exhibit 313. The respondents argued at trial that the "lawyer-qualified" elections involving black/white candidates

2. The Court Of Appeals' Analysis Of The Totality Of The Circumstances With The State Linkage Interest Does Not Conflict With Decisions Of This Court Or Of Any Other Circuits.

In *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419, 426, 111 S. Ct. 2376, 2381, 115 L. Ed. 2d 379 (1991), this Court stated that "the State's interest in maintaining an electoral system – in this case Texas' interest in maintaining the link between a district judge's jurisdiction in the area of residency of his or her voters – is a legitimate factor to be considered by the courts among the totality of the circumstances in determining whether a Section 2 violation has occurred." Thus, in Voting Rights Act cases involving the election of a trial court judge from the same geographic area as that judge's jurisdiction, this Court has added an additional factor to consider under the totality of the circumstances test.

The Fifth Circuit has interpreted this factor as being substantial in nature – requiring more proof of vote dilution as to the other factors in order to establish a § 2 violation – and considers the state "linkage" interest to be

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were more relevant than all other black/white elections because white voters in Hamilton County have as a matter of fact behaved significantly differently when a black lawyer ran for a "lawyer-qualified" public office as opposed to other black candidates. The white voter cross-over was 34% in these "lawyer-qualified" offices as opposed to 8.5% in all other elections involving black/white candidates. The fact that the black-preferred candidate prevailed 5 of 7 times in such elections supports the conclusion of the Court of Appeals that the District Court erred in its holding that the petitioners had met the third pre-condition.

substantial as a matter of law. On remand from this Court, the Fifth Circuit in *League of United Latin American Citizens Council, Inc. v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 501 U.S. 419, 114 S. Ct. 878, 115 L. Ed. 2d 379 (1994) (*LULAC*), determined that Texas' linkage interest was compelling as a matter of law based upon this Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452, 466, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) which held that the Age Discrimination Employment Act does not apply to state court judges in Missouri. In particular, the Fifth Circuit noted that, if according to this Court "the authority of the people of the states to determine the qualifications of their most important government officials. . . . lies at the heart of representative government," then "the people of Texas have at least a substantial interest in defining the structure and qualifications of their judiciary." *LULAC*, 999 F.2d at 873

The Court of Appeals in its earlier *Cousin* decision in 1995 agreed with the Fifth Circuit's analysis "to the extent that it concluded Texas had a substantial interest in linking trial judges' electorate to their jurisdiction, and concluded that, because Tennessee has no less legitimate an interest in its method of electing judges, the district court erred as a matter of law when it found Tennessee's interest in electing with a jurisdiction co-extensive with their electorate was 'nebulous at best.' " *Cousin*, 46 F.3d at 577. The petitioners argue that the respondents should be required to and failed to prove that Tennessee's linkage interest was substantial. Petition for Writ of Certiorari, pp. 17-18. To the contrary, this Court in *Houston Lawyers'* stated that the linkage interest is "a legitimate factor to be

considered by courts among the 'totality of circumstances' in determining whether a Section 2 violation has occurred". *Houston Lawyers'*, 501 U.S. at 426-27, 111 S. Ct. at 2380-81.[8]

Once the linkage interest was established as a "substantial" one by the Court of Appeals, then that interest was considered with all of the other Senate factors. The Court of Appeals noted this Court's point in *Houston Lawyers'* that the linkage interest "is merely one factor to

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[8] The petitioners argue that there is proof in the record that Tennessee's linkage interest is not as strong as asserted by the Court of Appeals. Specifically, the petitioners state that the Court of Appeals "ignores both the law and practice in Tennessee" noting that judges "may exercise judicial power totally 'unlinked' to the jurisdiction . . . [and that] in actual practice, [j]udges who testified at trial said they routinely served outside the areas in which they were elected." Petition for Writ of Certiorari, p. 17. To the contrary, the record reflects for example that the circuit court in Hamilton County cannot hear criminal cases. Tr., p. 129 (November 9, 1993). Furthermore, there is "not too much interchange" between circuit court and criminal court judges, and interchange between circuit court judges and chancellors is extremely "rare". *Id.*, p. 132. In those instances where a judge from Hamilton County travels to a different county to hear the case, the reason for such a circumstance is that the judges of the other county have recused themselves from the case requiring a judge from outside the jurisdiction to hear the case. Tr., pp. 132-33 (November 10, 1993). In order to provide a fair and impartial judge, there may be instances when a judge, who was not elected by the jurisdiction in which the case is heard, may have to hear a case as a result of recusal of local judges. This does not lessen the substantiality of the state's linkage interest, but merely deals with how to administer justice in recusal situations.

be considered in evaluating the 'totality of the circumstances,' [and] that interest does not automatically, and in every case, outweigh proof of racial vote dilution." *Cousin*, 46 F.3d at 575, *quoting Houston Lawyers'*, 501 U.S. 426-17, 111 S. Ct. 2380-81. The Court of Appeals then correctly weighed all of the Senate factors and concluded that there was no violation of § 2 under the "totality of the circumstances":

> We find that the district court's application of the totality of the circumstances test was clearly erroneous. We consider only the effects of past discrimination on blacks' political participation, the fifth 'typical' Senate factor, to cut clearly in favor of a finding of vote dilution. However, this one factor, in combination with the others, does not outweigh the significant linkage interest Tennessee has in electing the offices at issue here on an at-large basis. Therefore, even if we had considered the plaintiffs' showing sufficient to meet the three Gingles pre-conditions, we would not have found a Section 2 violation under the totality of the circumstances.

Cousin, 145 F.3d at 834.

Looking at the facts of this case, it is at best a "marginal" case for establishing vote dilution under the "totality of the circumstances". Voting is polarized in judicial elections; however, black lawyers have had success in winning such offices as city judge and county public defender. There has been no official discrimination in voting practices since the early part of this century, but blacks still suffer from a depressed socioeconomic status in the community making it more difficult for them to run for public and in particular judicial office. There is no

candidate slating process, and there was no finding by the District Court of overt or subtle racial appeals in campaigns. Finally, the present trial court judges and general sessions court judges have been responsive to the needs of blacks in Hamilton County by being fair and impartial to all citizens with no proof of discrimination against blacks as plaintiffs, defendants, attorneys, jurors or witnesses. When Tennessee's "substantial" linkage interest is added to these factors for consideration, it is clear that the Court of Appeals' decision was correct and is not in conflict with decisions of this Court or the Fifth Circuit concerning how to conduct the "totality of circumstances" analysis, as modified by this Court for judicial elections in *Houston Lawyers'*.

3. The Court Of Appeals' Decision Regarding The Legal Validity Of Single-Member District Or Cumulative Voting As A Remedy For A Section 2 Violation In A Judicial Election Does Not Merit Plenary Review By This Court.

The petitioners begin their Petition for Writ of Certiorari with the argument that "[t]he decision of the court of appeals that no remedy is available for a Section 2 violation in the context of judicial elections is nothing less than repeal of a critical and important provision of the Voting Rights Act, and is directly contrary to *Houston Lawyers'*. . . . " Petition for Writ of Certiorari, p. 14. Of course, this Court need not consider plenary review of the remedy in this case unless it grants certiorari on the liability issues, *i.e.*, the *Gingles* pre-conditions and the "totality of the circumstances" test. Furthermore, the question of the legal validity of subdistricts as a remedy

as considered by the Court of Appeals is pure dicta inasmuch as the District Court adopted cumulative voting and not subdistricts as the remedy.[9] In any event, the thrust of the petitioners' argument as to both single-member districts and cumulative voting is that the Court of Appeals erroneously held that the state's linkage interest "automatically" precludes any remedy from being imposed "even where there is a finding of vote dilution." Petition for Writ of Certiorari, pp. 14-16.

It should be emphasized that the Court of Appeals in determining liability under § 2 included the state's linkage interest as a factor in the "totality of circumstances" test in determining that there was no vote dilution. *Cousin*, 145 F.3d at 834. However, the Court of Appeals then did consider whether, even if the petitioners had met all the requirements for establishing a § 2 claim, the state's linkage interest would preclude the remedy of cumulative voting adopted by the District Court and the remedy of single member districts proposed by the petitioners.

Relying upon the Eleventh Circuit decision in *Nipper v. Smith*, 39 F.3d 1494, 1542 (11th Cir. 1994), the Court of Appeals concluded that both subdistricts and cumulative voting as remedies would be inappropriate in light of the state's linkage interest. *Cousin*, 145 F.3d at 828-30. In *Nipper*, the Eleventh Circuit, which has approached the

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[9] The Court of Appeals stated that "[e]ven if [it] had held plaintiffs' vote dilution claim valid, [it] would not have affirmed a remedy such as [the petitioners] proposed in this case because it is at odds with the important state interest in 'linkage.' " *Cousin*, 145 F.3d at 827.

"state interest" differently than the Fifth Circuit, held that the state's linkage interest "is of little, if any relevance in the totality of the circumstances test",[10] but that the linkage interest "plays a major role in consideration of the remedies the appellants propose as alternatives [and that] none of the alternatives constitutes an objectively reasonable and workable solution to the vote dilution in the present case." *Nipper*, 39 F.3d at 1542. *See also Davis v. Chiles*, 139 F.3d at 1424 . After rejecting subdistricts as an acceptable remedy, *Nipper*, 39 F.3d at 1544, the Eleventh Circuit also rejected cumulative voting as a legally acceptable remedy:

> Although cumulative voting would preserve linkage and avoid many of the concerns accompanying a subdistricting plan, such a scheme would create problems of its own. The traditional corporate cumulative voting method, or a modification thereof, would be workable if Florida's numbered post system were maintained. Requiring judges to run for unnumbered seats on the court, meaning that all of the judges seeking reelection would be forced to oppose each other, would have a detrimental effect on the collegiality of the court's judges in administrative matters.

Id.

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[10] The basis for the Eleventh Circuit's view is that the "linkage interest neither establishes nor rebuts the existence of racial bias in the voting community." *Nipper*, 39 F.3d at 1542. This approach is obviously inconsistent with this Court's instructions in *Houston Lawyers'* to weigh the state linkage interest with the other Senate factors in determining liability under § 2.

The Sixth Circuit in this case agreed with the Eleventh Circuit noting that "forcing these judges to oppose each other would, to a substantial degree, deny them the full appreciation of the benefits of their incumbency, increasing the possibility that the election would unseat some of the hardest-working and most efficient judges in the state of Tennessee. See Annual Report of the Tennessee Judiciary, 1996-97 (indicating that Hamilton County Circuit and Chancery Court judges shoulder among the highest workloads in Tennessee in terms of filings and dispositions per judge.)" *Cousin*, 145 F.3d at 830.

Although the Court of Appeals' discussion of the preclusive effect of the state's linkage interest of a single-member district remedy is inconsistent with this Court's analysis in *Houston Lawyers'*, that discussion is nothing more than dicta in that the single-member district remedy was not even adopted by the District Court. Thus, such an issue does not merit plenary review by this Court. As for the Court of Appeals' holding that cumulative voting as a remedy would be precluded by the state linkage interest, this Court need not grant plenary review of that issue because the underlying liability issues of the *Gingles* third pre-condition and the "totality of the circumstances" test do not merit a grant of certiorari in this case.

CONCLUSION

The petitioners have failed to provide any reasons for this Court to grant plenary review of this case. No decisions of other federal circuit courts or this Court conflict with the decisions of the Sixth Circuit. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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